SAME-SEX REGISTERED PARTNERSHIPS – A RIGHT TO BE RECOGNISED?

Across Europe, the legal recognition of same-sex relationships has changed tremendously. Of the 47 Member States of the Council of Europe, 26 countries currently recognise same-sex relationships, whether through marriage or registered partnership. Italy, however, remains the only founding member of that organisation that does not provide any formal system for the legal recognition of same-sex relationships.

In *Oliari and others v Italy* (Applications nos. 18766/11 and 36030/11) 21st July 2015, six applicants challenged this position, arguing that the absence of legislation permitting same-sex marriage or any other type of civil union constituted discrimination on the basis of sexual orientation thereby violating Articles 8, 12 and 14 of the European Convention on Human Rights. The applicants contended that even if the State was unprepared to recognise same-sex marriage, there was a strong imperative for a 'solemn juridical institution, based on public commitment' (at [107]). Existing piecemeal protections such as regional Civil Union Registers did not bestow relevant legal rights and were in any event administrative acts only available in a fraction of municipalities. Cohabitation agreements, regulated by legislation from 2013, also failed to bring 'social legitimacy and acceptance' (at [116]).

The Italian Government's argument for failing to legislate was not based on a desire to protect the traditional family. Rather, Italy sought to benefit from a wide margin of appreciation in relation not only to understanding but also responding to the 'changed common sense of the community' (at [122]). That response was already underway as at the time of the judgment the Italian Parliament was looking at the issue of registered partnerships. In the meantime, it was argued that Italy did recognise same-sex relationships through the Civil Unions Registers and judicial developments providing for equal treatment in specific contexts, decided on a case-by-case basis.

The Strasbourg Court reiterated that Article 8 encompasses both negative and positive obligations with the latter helping to 'ensure effective respect for rights protected by Article 8' (at [159]). Of crucial importance here was the balancing of the community interest with that of the individual. When determining the content of this positive obligation, the Court found that it must look at the 'discordance between social reality and law', the 'coherence of administrative and legal practices' and the impact the obligation would have on the State (at [161]). When implementing this obligation, a State, it was noted, would be afforded a margin of appreciation that would be narrow if the issue related to a 'particularly important facet of an individual's existence or identity' (at [162]). Conversely, this margin would be much wider where there was no consensus among Member States or the issue raised sensitive, moral or ethical issues. Therefore, the central issue in *Oliari* was to determine whether Italy had failed to comply with its positive obligation to respect private and family life through the provision of a legal framework that would recognise and protect the applicants' relationships.

In finding a violation of Article 8, the Court emphasised the need for both recognition and protection of same-sex relationships. Pre-existing protections such as local registers had 'merely symbolic value' (at [168]) and cohabitation contracts were

insufficient as they were open to anyone that was cohabiting rather than to couples in a committed, intimate relationship (furthermore, since *Vallianatos and others v Greece* (Application nos. 2931/09 and 32684/09) (2014) 59 E.H.R.R. 12 at [73], cohabitation was not deemed to be a prerequisite for finding the existence of a stable union). Indeed, the Court noted that individuals in Italy were at a disadvantage by having some rights recognised but often only after lengthy litigation within an 'overburdened justice system' (at [171]). A registered partnership scheme granting core rights would therefore cater for an important 'social need' by bridging the gap between reality and the law whilst at the same time not constituting a burden on the Italian state (at [173]).

In attempting to justify the interference under Article 8(2), Italy had also failed to identify a community interest that could be balanced against the 'momentous' interests of the applicants (at [185]). By not acknowledging national polls supporting same-sex rights, movements within the wider international community and the repeated calls for recognition even by the Italian Constitutional Court, Italy had failed in its positive obligation to provide a specific legal framework for same-sex relationships. Having found a violation under Article 8, the Court felt it unnecessary to analyse a violation of Article 8 read in conjunction with Article 14.

Oliari reveals a bold court recognising the importance and value of State ratification of an interpersonal relationship. When combined with the earlier decision in *Vallianatos*, *Oliari* undoubtedly increases the scope for same-sex relationships to be effectively protected under the Convention. However, despite representing a positive development, there are some caveats embedded within the Court's analytical approach that, to an extent, carve back the reach of the decision. Thus three points of note arise from this decision.

First, the creation of a positive obligation to provide a substantive registered partnership scheme for same-sex couples is perhaps the most striking aspect of *Oliari*. After calls in 2000 for the introduction of registered partnerships by the Parliamentary Assembly of the Council of Europe, the Court intimated that a positive obligation was now the most effective way of ensuring respect for same-sex relationships. This readiness to develop this new positive obligation in *Oliari* is reminiscent of *Marckx v Belgium* (Application No. 6833/74) (1979) 2 E.H.R.R. 330 where the clear disadvantage to the applicant, in contrast to the lesser interest of the State in protecting the traditional family, justified its creation (see W. Pintens and J.M. Scherpe, 'The Marckx Case: A "Whole Code of Family Law"? in S. Gilmore, J. Herring, and R. Probert, *Landmark Cases in Family Law* (Oxford and Portland, Oregon 2011)). However, it could be argued that by using a positive obligation route rather than an analysis using Article 8 read in conjunction with 14, the Court missed the opportunity to analyse both the discrimination faced by the applicants and any arguments justifying that discrimination advanced by the State (as undertaken in *Vallianatos*). Furthermore, the positive obligation's realisation will be highly dependent upon the nebulous notion of respect. This feature of Article 8 allows it to develop in response to societal change but, as the Court noted, respect was not 'clear-cut' and its meaning could vary in light of a diversity of practices in States (at [161]).

Secondly, *Oliari* compels Italy to act but for other Member States it appears that both the scope of the positive obligation under Article 8(1) and the breadth of the margin

of appreciation could be heavily dependent on several factors. This point was noted in the separate Concurring Opinion of Judge Mahoney, joined by Judges Tsotsoria and Vehabović, that believed other members of the Court were 'careful to limit their finding of the existence of a positive obligation to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States' (at [10]). Crucially, in *Oliari*, these factors were: statistics on the acceptance of same-sex relationships, the relationship between the judiciary and legislature and the disconnect between social reality and the law. Putting aside pertinent concerns raised in the Concurring Opinion as to whether such a qualified positive obligation can be 'conceptually possible' (at [10]), these caveats do suggest that the scope of the positive obligation could be limited. Even with an emerging consensus of States introducing registered partnerships, which the Court felt it 'cannot but attach importance' to (at [178]), these factors could be used by other Member States to defend applications on the basis that no disparity exists between societal attitudes and legal protection. Several Member States have introduced same-sex marriage bans within their constitutions and, whilst these would not preclude the introduction of same-sex registered partnership schemes, they may become evidence to show a lack of support for same-sex relationship recognition and thus a state of affairs far removed from that present in Italy.

Thirdly, the fact that the Court introduced a new positive obligation may explain its reluctance to explore Article 12 and the right to marry. As *Hämäläinen v Finland* (Application no. 37359/09) (2014) ECHR 787 at [96] had recently confirmed, the right to marry was exclusively applicable to opposite-sex couples only, perhaps unsurprisingly (cf. *Schalk and Kopf v Austria* (Application no. 30141/04) (2011) 53 E.H.R.R. 20 at [55]). Nevertheless, the Court in *Oliari* was unprepared to revisit this issue and arguably took a retrograde step by declaring the complaint on this point manifestly unfounded rather than merely exploring it and dismissing it.

In isolation, *Oliari* is an important authority that applies forceful pressure on Member States to recognise same-sex relationships and, in certain circumstances, introduce a substantive registered partnership framework. Even with the presence of factors that could potentially limit the scope of this positive obligation, the development of Article 8 in this manner undoubtedly represents a significant move. More importantly, combining *Oliari* with the earlier decision in *Vallianatos* now offers promising potential for much greater formal recognition and protection of same-sex relationships under the Convention.

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